NOT DESIGNATED FOR PUBLICATION

No. 106,990

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

KATHY L. BRIGGS,
Appellee,

and

GEORGE ARLYN BRIGGS,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed January 11, 2013. Affirmed.

Gregory V. Blume, of Overland Park, for appellant.

Robert S. Caldwell, of Caldwell & Moll, L.C., of Overland Park, for appellee.

Before PIERRON, P.J., MALONE, C.J., and BUKATY, S.J.

Per Curiam: George Arlyn Briggs appeals from the district court's discharge of the receiver and approval of the sale of the Briggs' house. He argues the district court abused its discretion by appointing a receiver without making the required finding of harm, and the receivership was void ab initio because the receiver failed to file the required oath and bond. We affirm.

Kathy L. Briggs filed for divorce from George in December 2005, citing irreconcilable differences and seeking, among other things, equitable division of assets. A

few days later, the district court filed an ex parte temporary order granting Kathy exclusive use and possession of the marital residence. The court ordered George to give his keys and garage door openers to Kathy, remove his personal effects from the house, and pay the insurance and taxes on the house. The court also restrained Kathy and George from selling assets without a mutual agreement or court order.

The district court held an evidentiary hearing in October 2008; Kathy and George appeared in person and through counsel. The court bifurcated the proceedings by granting Kathy's petition for divorce. The court indicated that it intended to adopt the parties' property division agreement, which provided for the house to be sold, the first $100,000 of proceeds after realtor fees to be paid to George, and the remaining proceeds to be split 50/50. The court also ordered the parties' chosen realtor to list the house for sale by December 5, 2008, and ordered the parties to cooperate with the realtor. The decree of divorce was filed on May 28, 2009.

In May 2009, the district court issued final orders. Kathy and George appeared in person but only Kathy had counsel. The court learned that the house had not been sold due to a conflict between the parties—George had refused to sign the listing agreement because he wanted the right of first refusal, whereas Kathy wanted to keep the house and pay George his portion of the equity. The court found that "the only rational means of dealing with the real estate" was to sell it, considering the parties' disagreement and the current condition of the economy and housing market. The judge also found that leaving the sale in the hands of the parties would cause further delay and issued the following order:

> "[T]he sale of the house will be handled through what I consider, what I will call or reference, as a receivership. I'm appointing Robert Caldwell who is an attorney here in Johnson County who has handled such sales for parties in contested matters, been appointed by not only this Court but other Courts in the past and continues to do that. Mr.

Caldwell has significant relationships with realtors. I believe it's primarily with Reece & Nichols. But he will be the overseer, if you will. He will be authorized to obtain the necessary signatures from [George and Kathy]. . . .

"As far as the selection of a realtor, the signing of the listing agreement, the listing price, the acceptable sale price, all closing, all of that will be handled by Mr. Caldwell. And the parties are directed to provide all authorizations, signatures, whatever is required by Mr. Caldwell in a prompt manner so that this house can be placed on the market and sold.

. . . .

"However, with no other conditions such as a first right of refusal, that is not any part of this sale. The house will be sold. And once sold at a . . . reasonable and legitimate price as determined by Mr. Caldwell as receiver, the value will be whatever it is sold at in a reasonably marketable condition. The cost of sale . . . will be whatever best negotiated real estate commission and all other closing costs so that there is . . . an actual dollar amount which will be paid into escrow authorized by Mr. Caldwell to be maintained either through his firm or with a realtor until disbursement of the proceeds.

. . . .

". . . But I will set aside the first $100,000 of the net sale proceeds to be distributed to Mr. Briggs.

". . . So after all sale costs and commissions are paid, that will be the net proceeds. . . . The balance of those proceedings [*sic*] will be divided between the parties 50/50."

The district court filed a "Journal Entry Appointing Receiver" on July 15, 2009. The journal entry gave Caldwell control of the sale of the Briggs' house. Specifically, it ordered him to determine the appropriateness of any listing, counteroffer, and sale price; permitted him to secure appraisals and realtor sales comparisons; empowered him to sign any real estate documents necessary to effectuate the sale in the event a party failed to cooperate; and instructed him to deposit the proceeds with the court for distribution.

In November 2009, the district court held a status conference at which George did not appear. The journal entry stated that Caldwell presented a report regarding the court-

ordered sale. The Briggs' house had been on the market for 6 weeks at $485,000 with a few inquiries and one showing. Based on Caldwell's recommendation, Kathy and Caldwell signed a listing agreement amendment reducing the price to $450,000, a move that was approved by the realtor and appraiser. Caldwell noted that the real estate was unique and located in a subdivision with a wide range of property prices and that George had been "generally uncooperative" in the sale process. The court directed George to submit any offers to buy the house directly to Caldwell and restrained George from being present at the house until closing.

The district court convened in February 2011 to consider an offer George had submitted to Caldwell. The journal entry stated that George offered to buy the house for $102,500 if the court would not take any expenses out of the proceeds. The court rejected the offer as "insufficient and unreasonable," deeming it an attempt to "subvert the Court's authority . . . to oversee the sale and disposition of proceeds." The court noted that there were numerous liens on the property that required satisfaction, including one for receiver's fees. In closing, the court restated its previous order that the house be listed via a 120-day listing agreement with realtor Sally West and that the price must be determined by West and Caldwell.

In June 2011, the district court heard Caldwell's motion to consider offers. George complained to the court that Caldwell had not been returning his calls, emails, or otherwise responding to his offers. George stated, "I don't understand how a person can be in receivership and be told to do something and they don't respond, ever." George was frustrated that the court refused to entertain his oral offer, considering financing on his written offer had expired. Caldwell offered to reduce his receiver fees from $6,400 to $5,000 if Kathy's offer was accepted that day and noted that West wished to withdraw as realtor. The journal entry stated that the court rejected Kathy's offer because it would not satisfy the outstanding liens. The court ordered Caldwell to continue acting as receiver and ordered the house to be listed with a new realtor of his choosing.

Again, in August 2011, the district court heard Caldwell's motion to consider offers. The journal entry stated that the court had previously ordered George to deposit $306,000 with the court clerk to buy the house. But because George had failed to deposit the funds, the court directed Caldwell to pursue negotiations with third parties, including an existing potential buyer.

On October 6, 2011, the district court convened upon Caldwell's motion for disposition of sale proceeds. George appeared in person and through new counsel. Caldwell informed the court that a real estate contract had been executed and was scheduled to close that day if George signed the documents or the following day if Caldwell had to sign on his behalf. George's attorney argued that the receivership was void ab initio—the same argument before us on appeal—because Caldwell had failed to execute the oath and bond required by Kansas law. Consequently, the court ordered Caldwell to file an oath and a $50,000 bond. The journal entry stated that the court voided the contract on the house due to "the disputed nature of the applicability of the statutory requirements for receivership under the facts and circumstances of this case." Caldwell filed a receiver's oath on October 7, 2011.

On October 13, 2011, the district court considered another offer. After notifying the court that his bond application was pending approval, Caldwell offered to waive his receiver fees and "go away" because the buyer had resubmitted its offer through his selected realtor, Shelly Williams. The court authorized Kathy to sign the closing documents on George's behalf, discharged Caldwell, and ordered Williams to submit the executed contract and proceeds to the court. The journal entry noted that "the receiver states that no reason exists to continue his appointment and work at this time." It also noted that the court rejected George's second oral offer due to his actions throughout the proceedings (interfered with third-party offer, withdrew one offer, and failed to secure financing for another offer) and the certainty of the other offer.

George appeals from all of the district court's rulings involving the receivership.

The Kansas Code of Civil Procedure addresses the subject of receivers. K.S.A. 60-1301 authorizes a district judge "to appoint a receiver . . . whose duty it shall be to keep, preserve, and manage all property . . . entrusted to the receiver pending the determination of any proceeding in which such property . . . may be affected by the final judgment." K.S.A. 60-1302 requires the receiver "before entering upon his or her duties, (1) be sworn to perform them faithfully, and (2) execute a bond with sufficient sureties to such persons on such conditions and in such sum as the judge shall direct." K.S.A. 60-1302 also provides that "the bond may be reduced by the court at any time." K.S.A. 60-1303 requires the receiver to "perform such acts respecting the property . . . as the judge may authorize."

In *Braun v. Pepper*, 224 Kan. 56, 61-62, 578 P.2d 695 (1978), our Supreme Court stated the law on appointing receivers in Kansas:

> "In *Browning v. Blair*, 169 Kan. 139, 145, 218 P.2d 233 (1950), the court stated that the power to appoint a receiver is limited almost exclusively to cases where it is necessary in order to prevent fraud, to save the subject of litigation from material injury, or to rescue it from threatened destruction. It is not properly exercised in any case where there is no fraud or imminent danger of the property sought to be reached being lost, injured, diminished in value, destroyed, wasted, or removed from the jurisdiction. In the opinion in *Browning* the court uses the following language:
>
> > '. . . It is only in cases of the greatest emergency that courts are warranted in tying up a business or property by appointing a receiver to take it from the control of the owner; neither should a receiver be appointed unless it is absolutely necessary and there is no other adequate remedy. A receiver should never be appointed where it may do irreparable injury to others or where greater injury is likely to result from such appointment than if none were made.' [Citations omitted.]"

It is not uncommon for courts to appoint receivers in divorce cases. See *Fincham v. Fincham*, 171 Kan. 120, 125-28, 231 P.2d 232 (1951) (court had appointed receiver to manage husband's land); *Esposito v. Esposito*, 128 A.D. 2d 581, 513 N.Y.S.2d 8 (1987) (court appointed receiver to sell property where record was replete with evidence of bidding war, obstructionism, and bad faith); see also *Gunther v. Gunther*, 367 S.W.2d 206 (Tex. Civ. App. 1963) (no abuse of discretion in *sua sponte* appointment of receiver to sell marital real estate);

Here, George claims that the receivership was void ab initio because Caldwell failed to file the required oath and bond and the district court abused its discretion by appointing a receiver without making the required finding of harm. First, Caldwell did file an oath before he was discharged. Second, a bond is arguably permissive because it can be reduced by the district court at any time. Most importantly, a reasonable person would have agreed that there was imminent danger of the Briggs' house diminishing in value and the only adequate remedy was a receivership. The parties could not agree on a listing price, the economy and housing market were unstable, and the court did not have the expertise to set a listing price itself.

Therefore, the district court did not abuse its discretion by appointing a receiver to sell the Briggs' house.

Affirmed.